United Nations AT/DEC

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1210

Case No. 1297: TEKOLLA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 10 January 2003, Yeshewalul Tekolla, a former staff member of the United Nations, filed an Application requesting the Tribunal to order, inter alia, as follows:

> " (c) ... the payment ... of [a Special Post Allowance (SPA)] for the entire period [from 1 October 1993 to 1 November 1995 at the P-4 level and from 15 September 1995 to 30 June 1996 at the P-5 level] taking into account the two, different levels at which he performed the functions of the posts.
>
> ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2003 and once thereafter until 31 December 2003;

Whereas the Respondent filed his Answer on 31 December 2003;

Whereas the Applicant filed Written Observations on 18 January 2004;

Whereas, on 11 October 2004, the Applicant submitted an additional communication;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"*Employment History*

... The [Applicant] joined the Organization on 3 December 1962 on a three-month short-term appointment as a Documents Clerk at the [G-6] level with the United Nations Economic Commission for Africa (ECA). [His] appointment was subsequently extended ... [and, effective 1 March 1974, he was granted a permanent appointment]. ... On 1 April 1979, he was promoted to [the] P-2 level and his title was changed to ... Associate Economic Affairs Officer. On 1 April 1985, he was promoted to [the] P-3 level and his title was changed to Economic Affairs Officer.

...

Summary of the facts

... The [Applicant] ... assumed the duties and responsibilities of an Economic Affairs Officer at [the] P-4 level from October 1993 until 1 November 1995.

...

[On 24 August 1994, the Officer-in-Charge (OiC), Food and Agriculture Policy and Planning Section (FADPPS), wrote to the Director, Joint ECA/Food and Agriculture Organization (FAO), Agriculture Division, concerning '[p]roposals for temporary placement of [the Applicant] on post P4-041' and reminding him of previous communications on this issue, dated 1 April 1994 and 15 July 1994.]

[On 25 November 1994, the Director, Joint ECA/FAO Agriculture Division, requested the Chief, Personnel Section, to place the Applicant against post number P4-041 while the incumbent was on mission and for him to receive SPA to the P-4 level, pending the incumbent's return].

[On 17 March 1995, the Applicant was informed that action was being taken to place him against that post.]

[On 6 September 1995, the OiC, Agriculture Division, wrote to the Chief, Administration and Conference Services Division, confirming that the Applicant had been carrying out the activities of the P-4 post since October 1993; noting that no SPA has been paid to him since he took over the activities of the post; and, seconding his predecessor's recommendation that the Applicant be paid an SPA.]

... [On 15 September 1995, the Applicant also] assumed the duties and responsibilities of [the P-5 post of OiC, FADPPS. He carried out these duties and responsibilities until 30 June 1996.]

[On 2 March 1998, the Office of Human Resources Management (OHRM) advised the Human Resources Management Section, ECA, (HRMS), that the Applicant's pending SPA case was never finalized and requested additional information prior to presentation of the Applicant's case to the SPA Committee.]

[On 14 May 1998, OHRM informed HRMS that '[g]iven the existing policy to restrict the retroactivity of SPA's to one year from the date when the recommendation was first made, as well as a lack of clarity on the exact dates when [the Applicant] was formally assigned to perform the [higher level] functions ... we regret that we are unable to support this request for an SPA'.]

[On 7 August 1998, the Applicant requested HRMS to re-examine his case and forward it to Headquarters 'for favourable consideration and appropriate action'.]

[By e-mail dated 18 August 1998, HRMS confirmed that the Applicant had served as OiC, FADPPS, for ten months, ending in June 1996, and that from October 1993 to November 1995, he was also put against a higher level post (P4-041). The e-mail further stated that the Applicant's request for SPA was justified 'but of course there is the issue of one year retroactivity which we have to take into account'.]

[On 4 December 1998, the Applicant requested early retirement and, on 25 June 1999, he signed a Memorandum of Understanding (MOU) accepting the terms of the agreed termination, which included, inter alia, his agreement that the Organization had no further obligations to him.]

[On 29 June 1999, the Applicant was granted an SPA at the P-4 level for the period from 1 December 1995 until 30 June 1996.]

[On 30 September 1999, the Applicant separated from service.]

... The [Applicant] appealed to [HRMS] on 10 January 2000, claiming that retroactivity should not apply to his case, as the lack of payment had been caused by the failure of the ECA administration to take appropriate action on time.

... [On 27 March 2000] ... [HRMS] rejected the [Applicant's] claims, on the grounds that he had signed [the MOU] stating his agreement that the Organization would have no further obligation financially or otherwise to him upon separation."

On 25 April 2000, the Applicant requested the Secretary-General to review the administrative decision not to grant him an SPA for the two separate posts he had encumbered during the periods October 1993 through November 1995 and December 1995 through June 1996.

On 25 July 2000, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 5 November 2002. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

29. ... [T]he Panel concluded that it was not in dispute that the Appellant performed the duties and responsibilities of the P-4 [post] from October 1993 until November 1995.

32. ... The Panel ... agreed that [the memorandum by the Chief of Personnel Section, to the Appellant, dated 17 March 1995] ... defined the period of the approved entitlement for the SPA. ...

33. The Panel agreed that the Appellant was entitled [to receive] SPA for [performing the] functions of an Economic Affairs Officer at the P-4 level between March 1995 and December 1995, in accordance with the [above-mentioned] memorandum ...

34. As for the P-5 post [of] Officer-In-Charge, the Panel concluded that the Appellant assumed the duties and responsibilities of the post from 15 September 1995 until 30 June 1996.

35. The Panel ... concluded that the Appellant was entitled to SPA in accordance with [paragraph 9 of] Personnel Directive PD/1/84/Rev.1, [entitled 'Special post allowance'] dated 28 September 1990 ...

37. The Panel pointed out that the wording of [the above-mentioned] paragraph 9 clearly indicated that the legislator foresaw a situation in which a staff member may assume duties and responsibilities of a post, which [was] two levels higher than his current level. In such a situation, the staff member [would] not be entitled to receive an SPA [at] the level of the post ... SPA would be [paid] only one level above the ... employee's level.

39. ... [T]he Panel concluded that [the Appellant] was entitled to an SPA to the *P-4 level* for his service as ... Officer-In-Charge, for the period between 15 September 1995 until 30 June 1996, despite the ... *P-5 level* of the post he assumed.

41. The Panel agreed that the Appellant should be paid the [SPA for the] remainder [of the period during which he was performing the duties of] the P-4 and P-5 level posts ... regardless of the MOU ...

42. Moreover, the Panel agreed that the MOU could not have included the SPA issue, because the Appellant had assumed in good faith that the reason for not receiving the SPA was a technical problem and therefore was still pending. In addition, the Panel determined that not including the SPA issue in the MOU does not necessarily indicate that the entitlement or non-entitlement of the Appellant to SPA.

Conclusions and Recommendations

44. In light of the foregoing, the Panel *unanimously agreed* that the Appellant should be paid an additional payment of an SPA for assuming the duties and responsibilities of an Economic Affairs Officer at the P-4 level, for 5 months, the period between 1 July 1995 and 1 December 1995.

45. The Panel further *unanimously agreed* that it should be recommended, in light of the case above and in light of paragraph 9 to PD/1/84/Rev.1, that situations in which a staff member performs the functions of a post two levels higher than his current level, it should be clarified by [OHRM] to the staff member, that he is not entitled to the SPA according to the level of the post encumbered, but only one level higher than his current post. The reason for such a clarification is that a staff member will be able to consider his desire to encumber the position, keeping in mind that there is no correlation between the remuneration for the level of the post encumbered, to that of the SPA. This would prevent any unreasonable expectancy by the staff member, and would avert any misunderstanding between the staff member and OHRM".

On 10 January 2003, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 10 July 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General accepts the conclusion of the Board regarding your entitlement to receive payment of the SPA for assuming the duties and responsibilities of an Economic Affairs Officer at the P-4 level for five months. He has therefore decided to accept the recommendation of the Board, and, accordingly, to pay you five months of the SPA at the P-4 level".

Whereas the Applicant's principal contentions are:

1. Given the JAB's determination, that the Applicant had assumed the P-4 post from October 1993 to 1 November 1995 and the P-5 post from 15 September 1995 to 30 June 1996, it would be "ethically, technically, logically and managerially appropriate" to pay the Applicant SPA for the entire period, taking into account the two different levels of the posts, the functions of which he performed.

2. Personnel directive PD/1/84 Rev.1, on which the JAB relied in recommending SPA only to the P-4 level, fails to establish a positive correlation between the awarded SPA and the nature and magnitude of the work load encumbered by the Applicant.

3. Despite the fact that the Applicant encumbered the P-4 post for 25 months, the JAB recommended SPA for 5 months only, covering only a fraction of the period during which he encumbered the post, and ignoring the confirmation by the Applicant's supervisors of his assumption of the P-4 post as of October 1993.

4. The issue of retroactivity should not apply to the Applicant's case, as it would not have arisen had the appropriate office taken the required steps in a timely manner.

Whereas the Respondent's principal contentions are:

1. The Applicant should be paid, and was awarded, only the additional SPA at the P-4 level for the period from 1 July 1995 to 1 December 1995.

2. The Applicant is not entitled to be paid an SPA at more than one level higher than his level.

3. The decision relating to the payment of SPA in this case has not been vitiated by bias or unfairness.

The Tribunal, having deliberated from 1 to 24 November 2004, now pronounces the following Judgement:

I. The JAB has found as a fact that the Applicant had assumed and discharged the duties of an Economic Affairs Officer at the P-4 level for the 25-month period, from 1 October 1993 to 1 November 1995. It likewise made a finding that the Applicant had assumed and discharged the duties of OiC, FADPPS, at the P-5 level from 15 September 1995 until 30 June 1996. Thus, the first six weeks of the second period overlap the former period.

In any event, there is really no issue but that the Applicant had been assigned duties at higher level posts for a continuous period from 1 October 1993 to 30 June 1996, and no contradictory evidence on these aspects had ever been offered by the Respondent.

II. Since the Applicant was at all material times a staff member of ECA at the P-3 level, he understandably claimed to be entitled to SPA for the periods during which he assumed the duties and responsibilities of the P-4 and P-5 posts, to be calculated in

accordance with the appropriate directives. PD/1/84/Rev.1 of 28 September 1990, entitled "Special post allowance", which governs the payments of SPA, provides that such payments are not normally payable until the beginning of the fourth month after the staff member has assumed the full functions of the higher level post. Whilst on the information provided by the Applicant there was an overlapping period from 15 September until 1 November 1995, when he was performing the duties of both the P-4 and P-5 posts, the Tribunal is satisfied that on a proper construction of PD/1/84/Rev.1 he would not be entitled to payment of more than one SPA for that period. It therefore matters little when he ceased performing the duties of the P-4 post, or when he assumed the duties of the P-5 level post, or whether, in fact, there was an overlap, as this would not have effected the ultimate calculation. The Tribunal is further satisfied that, following the provisions of PD/1/84/Rev.1, since the Applicant was firstly assigned the P-4 duties and secondly assigned to perform the P-5 level duties, these must be considered as distinct and different assignments, so that normally the first three months of each period would have to be discounted.

As found by the JAB, the Applicant's eligibility for payments of SPA was confirmed by his Division's request to grant him same, dated 25 November 1994 and a subsequent reminder dated 6 September 1995. However, in the view of the Tribunal, ECA's responses to these requests can best be described as vacillating, procrastinating and evasive. All sorts of obstacles were put in the way of making a decision and, when on 29 June 1999, a decision recognizing that the Applicant was entitled to SPA payments was ultimately made, it was decided that he would be paid only for the period 1 December 1995 until 30 June 1996. The reason given for declining to allow payments for the extended period was the alleged bar against retroactive payments.

In the opinion of the Tribunal this reason was, in the circumstances of this case, unconscionable and ought not have been invoked, since the delay in dealing with the issue, which thereby gave rise to the proposition that the requests for SPA were for retroactive payment, were caused by the dilatory manner in which the Administration had dealt with those requests.

III. The Applicant appealed to the JAB against the decision to deny him payments of SPA for other than the said seven-month period. His claim was resisted by the Respondent who, inter alia, sought to argue that the Applicant's claim (if it had merit) was extinguished by an MOU which the Applicant had signed on the occasion of his

retirement. According to the Respondent, in signing the said MOU, the Applicant had waived any such claim as he may have had against the Administration and he had also acknowledged that no further claims would be made. Here, again, the Tribunal considers that this submission was unconscionable. It is clear from the record that the parties had not contemplated that the Applicant's signature on this MOU would extinguish his then pending claim for SPA and the Administration must have appreciated, or ought to have appreciated, that it was considered, at least by the Applicant, as applying only to matters such as his separation benefits and matters of that nature. Had it been intended by the Administration that the Applicant should have been asked to waive his then outstanding claim for SPA, this should have been clearly indicated in the document he was asked to sign, for it was quite reasonable for him to assume, in the absence of it being mentioned, that the MOU related only to his retirement entitlements.

IV. The Tribunal has difficulty identifying the logic or rationale of the JAB's recommendation. The JAB recommended payment of SPA solely for the period from 1 July until 1 December 1995, apparently on the basis that there had been a gap between "the approval of the assumption and the performance of the functions" and on a finding that "the only evidence given for the approval of assuming the post, and therefore entitlement for SPA, was a Memorandum from ... [the] Chief of Personnel Section, to the Appellant, dated 17 March 1995". These assertions contradict what were findings of fact earlier made by the JAB itself and were neither supported by evidence nor contended by the Respondent. All available evidence was in the teeth of this finding. The Tribunal must conclude that it was some sort of compromise arrived at by the JAB so as to discount the Applicant's claim because they considered it should arrive at some sort of compromise recommendation for some un-stated reason.

The Respondent accepted the recommendations made by the JAB and has paid SPA to the Applicant as recommended. In the view of the Tribunal, since the recommendation of the JAB was neither rational nor reasonable in all of the circumstances, but was clearly a recommendation made arbitrarily and without a proper basis in fact, the Respondent's decision to act upon it must be considered to share the same infirmities.

V. The Tribunal fully appreciates that the payment of SPA is not a staff member's absolute entitlement and that under staff rule 103.11(b) and PD/1/84/Rev.1 the

Respondent possesses discretionary authority in this matter. This has also been confirmed by the Tribunal in its jurisprudence (See, for example, Judgement No. 1057, *Da Silva* (2002).) However, this is a *quasi* judicial discretion which cannot be exercised capriciously or arbitrarily. Since no rational or cogent reason has been advanced as to why the Applicant should not have received payment for any period other than from 1 December 1995 until 30 June 1996 (which was awarded to him by the Respondent on 29 June 1999) and from 1 July until 1 December 1995 (which was awarded to him following the recommendation of the JAB) and since no rational basis has been advanced for this refusal, nor can one be inferred from the record, the Tribunal is satisfied that the decision not to allow payment for any time outside these periods was not made as a result of a lawful or reasonable exercise of the Respondent's discretion.

The Tribunal therefore takes as a starting point that the Applicant would have been entitled to receive the balance of SPA due to him for the two periods between 1 October 1993 and 30 June 1996, less the three-month deduction from the first period and a further three-month deduction from the second period and having allowed credit for the sums paid by the Respondent to the Applicant. The payment should be calculated on the basis of the provisions of PD/1/84/Rev.1, paragraph 9 of which provides that "SPA is not normally payable at more than one level higher than that of the staff member". The Applicant claims that this is unfair in relation to the second period, when he was assigned the duties of OiC, FADPPS, which was a post at the P-5 level. However, the Applicant failed to identify any legal principle as to why the substance of the Directive in question should not apply, nor did he provide grounds for seeking an exception to it.

VI. The Tribunal wishes to reiterate its view that the assumption of higher level posts by staff members and the payment of SPA as compensation for doing so have always been considered to be a temporary arrangement. It is partly for this reason that the payment of SPA does not begin until the fourth month of assumption of the higher-level duties. It is likewise for this reason that SPA payments would not normally be for more than a year, as this would be ample time in which to conduct a proper promotion or placement exercise. Any other interpretation could lead to mal-administration, in either inappropriately promoting staff members through the "back door" or else expecting staff members to perform higher-level duties for an extended period of time,

while compensating them for performing these duties only for one year. The Tribunal is satisfied that this was not the intention of the Directive.

Having considered that the Applicant performed the duties of the P-4 and P-5 level posts for a total of 33 months, that he was paid SPA for a total of 12 months and having determined that a deduction of three months would have applied to each of the periods as explained above, the Tribunal finds that the Applicant should have been granted an SPA for an additional 15 months.

VII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid compensation equivalent to SPA at the P-4 level at the rate in effect at the time of this Judgement for an additional period of 15 months; and

2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary